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89-1203

Supreme Court, U.S.
FILED
JAN 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

COMMONWEALTH OF KENTUCKY — PETITIONER

versus

GEORGE W. PETERSON — RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

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QUESTION PRESENTED

WHERE EVIDENCE OF AN UNCHARGED ASSAULT IS INTRODUCED TO PROVE THE ASSAILANT'S MOTIVE FOR A SUBSEQUENT MURDER OF WHICH HE IS ULTIMATELY ACQUITTED, DOES DOUBLE JEOPARDY BAR A LATER INDICTMENT AND PROSECUTION FOR THAT ASSAULT?

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The Attorney General of Kentucky respectfully petitions this Court for a writ of certiorari to review the judgment below by the Kentucky Court of Appeals.

OPINIONS BELOW

By unreported opinion rendered September 15, 1989, the Kentucky Court of Appeals reversed Respondent's assault conviction on grounds of former jeopardy and collateral estoppel. (Appendix 2a-15a). Citing various decisions by this Court, the state appellate court concluded that jeopardy had attached to Respondent's assault charge when evidence of it was used to prove motive for a murder committed four days later. The state appellate court reasoned that acquittal of the murder charge should be imputed to the then uncharged assault. Thus the Kentucky Court of Appeals held that Respondent's

subsequent indictment and prosecution for the assault was barred by the collateral estoppel component of the Double Jeopardy Clause.

The Supreme Court of Kentucky denied the Attorney General's timely motion for discretionary review by order entered November 22, 1989. (Appendix 1a).

JURISDICTION

The opinions below by Kentucky's state appellate courts became final on November 22, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> "(N)or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

In November 1983, Respondent and Debora Pruitt were jointly indicted for the February 20, 1983 murder of the latter's husband by shooting him with a pistol. (TR 83CR1623 @ 1). Each was charged as principal and accomplice (" . . . acting alone or in complicity with each other . . ") in the murder. (Id.). No other crime or act was mentioned in the indictment. (Id.).

Debora's separate trial resulted in a 20 year prison sentence for complicity to murder. Pruitt v. Commonwealth, Ky., 700 S.W.2d 68 (1985).

A jury acquitted Respondent of the February 20, 1983 homicide. (TR 83CR1623 @ 104-105, 108). During that trial, the government introduced evidence of an extramarital relationship between Debora and Respondent as a possible motive for the February 20th killing. (TE 83CR1623 3/20/85 @ 18, 44-45, 95-98). The government also introduced evidence that Respondent had assaulted the victim with a skillet on February 16, 1983 -- four days prior to the murder. (TE 83CR1623 3/20/85 @ 12-16, 54-55, 60; 3/21/85 I @ 16-18, II @ 13-16). Respondent admitted the extramarital relationship. (TE 83CR1623 3/22/85 @ 21-22). He also admitted the February 16th assault with the skillet, but claimed that it was self-defense. (TE 83CR1623 3/22/85 @ 40-43).

In June 1985, Respondent was indicted for the February 16, 1983 incident. (85CR0888). Count I charged him with attempted murder by use

of "a dangerous instrument" (the skillet); Count II alternatively charged him with assault in the second degree. (Id.). Respondent's motion to dismiss the indictment on grounds of double jeopardy was denied. (TR 85CR0888 @ 19-35). The Kentucky Court of Appeals denied Respondent's interlocutory appeal from that ruling by order entered November 3, 1986. (TR 85CR0888 @ 36-43). On April 1, 1987, that court also denied Respondent's petition for writ of prohibition. (87-CA-342-OA). Respondent appealed that ruling to the Kentucky Supreme Court, which affirmed the denial of relief by unreported opinion rendered September 24, 1987. (87-SC-390-MR).

At Respondent's March 15, 1988 trial, the government elected to proceed on the attempted murder charge (Count I) with the second degree assault charge (Count II) as a lesser included offense. (TR 85CR0888 @ 76-109). On March 17,

1988 the jury acquitted Respondent of attempted murder for the skillet incident, but convicted him of assault in the second degree. (TR 85CR0888 @ 86-109). Respondent was sentenced to five years in prison accordingly. (TR 85CR0888 @ 184-194).

REASONS FOR GRANTING CERTIORARI

THE COURTS BELOW HAVE ERRONEOUSLY CONCLUDED THAT RESPONDENT'S ACQUITTAL OF THE MURDER CHARGE DETERMINED THE ULTIMATE ISSUE FOR PURPOSES OF HIS SUBSEQUENT TRIAL ON THE ASSAULT CHARGE.

The facts at issue here present the flipside of a Double Jeopardy/collateral estoppel question resolved by this Court only 12 days ago. In Dowling v. United States, No. 88-6025 (decided January 10, 1990), the Court held that the collateral estoppel component of the Double Jeopardy Clause does not prevent the government from using evidence of an acquitted crime to prove guilt on a related charge in a subsequent

trial. Dowling is consistent with earlier decisions by this Court in which the subsequent trial was permitted because it required a lesser standard of proof than in the first trial. The Dowling line of cases recognizes the difference between a verdict of not guilty and a determination of innocence. Failure to prove guilt beyond a reasonable doubt does not preclude the government from later proving the issue in a context where its burden of proof standard is lower. E.g., One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 235 (1972) (forfeiture action following acquittal was permitted because "the difference in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel."); United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361-362 (1984) (forfeiture action following acquittal was permitted even though requisite element for

forfeiture was guilt of the acquitted charge); Helvering v. Mitchell, 303 U.S. 391, 397 (1938) ("[t]he difference in degree in the burden of proof in criminal and civil cases precludes application of the doctrine of res judicata.").

Dowling, supra involved the subsequent use of an acquitted charge to prove guilt of a different crime. The difference between this case and Dowling is that here the higher burden of proof applied in the later trial. In the present case, the February 16th assault was not a necessary element of the February 20th homicide,[1] nor was Respondent charged with the act of assault at the time of the homicide trial. It was introduced only to prove

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[1]Kentucky law merely requires proof of a collateral crime by a preponderance of the evidence. See Lawson, The Kentucky Evidence Law Handbook, 2nd Ed., Section 2.20, p. 40 (Michie 1984).

motive[2] for the killing, which the government did not have to do. Thus, the jury in Respondent's first trial could acquit or convict on the February 20th homicide charge regardless of whether it believed or disbelieved the evidence concerning the February 16th assault incident. Under these circumstances, the first jury's acquittal on the February 20th homicide did not amount to an ultimate determination of the February 16th assault.

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[2]The Kentucky Court of Appeals at one point refers to this as evidence of a "conspiracy." (Appendix 3a). For the sake of clarity, it should be observed here that "conspiracy" to commit murder is not punishable as a crime under Kentucky law. "Complicity" to murder, which Respondent did face, requires more than planning or conspiring the victim's death. It requires that the victim actually die at the hands of another. Ky.Rev.Stat. 502.020. See Wilson v. Commonwealth, Ky., 601 S.W.2d 280 (1980).

Dowling stands for the proposition that acquittal does not foreclose relitigation of the issue under a lower standard of proof. Applying the same reasoning, it is logical to conclude that the mere opportunity to decide an issue of fact should not foreclose its relitigation where a higher burden of proof applies and where the jury was not required by law to decide it. Unless it is clear from all the circumstances that the first jury actually decided the issue, the United States Constitution should not be used to preclude a reliable determination of the matter.

Here, as in Ashe v. Swenson, 397 U.S. 436, 444 (1970), a verdict of acquittal which does not speak concerning the uncharged crime requires the reviewing court to:

> examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its

> verdict on an issue other than that which the defendant seeks to foreclose from consideration. (citation omitted).

The burden of proving that the issue was actually determined by the former trial is on Respondent, not the government.

> The Court of Appeals have unanimously placed the burden on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding. (citations omitted). We see no reason to depart from the majority rule in this case (footnote omitted).

Dowling, supra, 46 Crim.L.Rep. at 2059.

Respondent cannot satisfy the foregoing burden in this case. In the first trial, the only mention of the February 16th assault was during the testimony of the witnesses. They, like Respondent himself, testified about the matter without objection. (TE 83CR1623 3/20/85 @ 12-16, 54-55, 60; 3/21/85 I @ 16-18, II @ 13-16; 3/22/85 @ 40-43). There was no reference to it whatsoever in the indictment, pleadings,

jury instructions, verdict, or trial court judgment. (TR 83CR1623 @ 1, 104-108). Ashe v. Swenson, supra, 397 U.S. at 444; Dowling v. United States, supra, 46 Crim.L.Rep. at 2059-2060.

"Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." Montana v. United States, 440 U.S. 147, 164, n.11 (1979). The doctrine of collateral estoppel does not apply where "[t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action." Restatement (Second) of Judgments §28(1) (1982). Applying this standard, it is clear that the doctrine of collateral estoppel should not have foreclosed the second trial in the present case. The policies underlying the collateral estoppel doctrine -- avoidance of inconsistent verdicts, judicial economy, and

fundamental fairness -- do not support the giving of preclusive effect to Respondent's acquittal any more than to the acquittal of the defendant in One Assortment of 89 Firearms, supra.

Respondent's mere exposure to evidence of an uncharged crime did not subject him to "jeopardy" on that offense. The risk to which the term "jeopardy" refers "is that traditionally associated with 'actions intended to authorize criminal punishment to vindicate public justice.'" Breed v. Jones, 421 U.S. 519, 529 (1975), quoting United States ex rel. Marcus v. Hess, 317 U.S. 537, 548-549 (1943). "Without risk of a determination of guilt, jeopardy does not attach." Serfass v. United States, 420 U.S. 377, 391-392 (1975). Thus, in Standefer v. United States, 447 U.S. 10 (1980) the acquittal of a principal did not benefit an accomplice in a later trial involving the same crime.

Respondent's first trial did not expose him to any "risk" of conviction or punishment for the February 16th assault. Instead, the only risk faced by Respondent was that the jury might rely on it and other evidence, such as his extramarital relationship with the victim's wife, to infer a motive for participating in the murder four days later. In that respect, the February 16th incident involving the skillet was no different than any other evidence offered to prove Respondent's motive or identity. Respondent's subsequent indictment and prosecution for the February 16th incident did not amount to "repeated attempts to convict" under these circumstances. Green v. United States, 355 U.S. 184, 187 (1957). He has not been subjected to multiple prosecutions for the same offense, Brown v. Ohio, 432 U.S. 161 (1977), or to cumulative punishments for a single criminal transaction, Blockburger v. United States, 284 U.S. 299 (1932).

Only six days ago, the Court summarily vacated a Third Circuit ruling virtually indistinguishable from the present case, remanding it for further consideration in light of Dowling, supra. See United States v. Salamone, No. 88-2092 (decided January 16, 1990) reported below as United States v. Salamone, 869 F.2d 221 (CA3 1989). The Court is urged to do no less in this case.

CONCLUSION

WHEREFORE, a writ of certiorari should be granted.

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SUPREME COURT OF KENTUCKY
89-SC-767-D
(88-CA-938)

COMMONWEALTH OF KENTUCKY — MOVANT

vs. JEFFERSON CIRCUIT COURT
NO. 85-CR-888

GEORGE W. PETERSON — RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED November 22, 1989.

/s/ Robert F. Stephens
Chief Justice

RENDERED: September 15, 1989; 10:00 a.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 88-CA-938-MR

GEORGE W. PETERSON — APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE WILLIAM KNOPF, SPECIAL JUDGE
ACTION NO. 85-CR-0888

COMMONWEALTH OF KENTUCKY — APPELLEE

REVERSING

* * * * *

BEFORE: DYCHE, REYNOLDS and WEST, Judges.

REYNOLDS, JUDGE. This is an appeal from a judgment upon a conviction of assault, second degree.

The death of Bradley Pruitt on February 20, 1983, resulted in an indictment being issued wherein appellant was co-indicted with Debra

(Mrs. Bradley) Pruitt upon the charges of murder and complicity. Mrs. Pruitt was convicted for complicity to commit murder. The jury returned a verdict of not guilty as to Peterson.

At the trial aforesaid (the first trial) the Commonwealth introduced extensive evidence that appellant and another individual were engaged in a plan to murder Bradley Pruitt and that such conspiracy extended from February 6, 1983 until February 20, 1983.

After the first trial Peterson was again indicted (two counts). The first charge being: "That on or about the 16th day of February 1983, in Jefferson County, Kentucky, the above-named defendant, George W. Peterson, alone or in complicity with another, committed the offense of criminal attempt murder when he struck Bradley N. Pruitt with a dangerous instrument with intent to kill him." Count 2 provided: "That on or about the 16th day of February,

1983, in Jefferson County, Kentucky, the above-named defendant, George W. Peterson, committed the offense of assault in the second degree when he intentionally caused physical injury to Bradley N. Pruitt by means of a dangerous instrument." The appellant's dismissal motion on the grounds of double jeopardy was denied.

The trial court on the date of trial, upon the Commonwealth's motion, dismissed Count 2 of the indictment (assault in the second degree) as the Commonwealth had elected to try Peterson for the offense of criminal attempt murder. The order was entered upon agreement of appellant's counsel.

The jury, at the conclusion of its deliberation, returned a "not guilty" verdict to the criminal attempt murder charge, but did return a "guilty" verdict on a lesser included charge of assault, second degree. An objection

to a jury instruction on assault, second degree preserves this error. Appellant was sentenced to five year's imprisonment.

Appellant maintains that KRS 505.040 prohibits the Commonwealth from retrying him for conduct that occurred February 16, 1983.

The Supreme Court of the United States has stated that there should not be repeated attempts to convict an individual for an alleged offense. Benton v. Maryland, 395 U.S. 784 (1968). KRS 505.040 states that:

> "Although a prosecution is for a violation of a different statutory provision from a former prosecution or for a violation of the same provision but based on different facts, it is barred by the former prosecution under the following circumstances:
>
> (1) The former prosecution resulted in an acquittal, a conviction which has not subsequently been set aside, or a determination that there was insufficient evidence to warrant a conviction, and the subsequent prosecution is for:
>
> (1) An offense of which the defendant could have been convicted at the first prosecution; or

(b) An offense involving the same conduct as the first prosecution, unless each prosecution requires proof of a fact not required in the other prosecution or unless the offense was not consummated when the former began; or . . . .

From our study of the transcript of evidence of appellant's first trial, we readily determine that the Commonwealth introduced extensive evidence regarding the February 16, 1983, assault of which Mr. Peterson was convicted at the second trial. Without equivocation, this evidence was used to illustrate that Peterson was engaged in a plan/scheme to murder Bradley Pruitt and constituted proof of guilt of complicity in Pruitt's murder. We believe that appellant's acquittal arising from the first trial immunized him from prosecution in this latter case under the specific facts of these two cases. Peterson had been subjected to jeopardy and could not be retried. See Sherley v. Commonwealth, Ky., 558 S.W.2d 615 (1977);

Marshall v. Commonwealth, Ky., 625 S.W.2d 581 (1982). The statutory threshold requirements are found to have been satisfied. Initially, it is required that the first prosecution has resulted in an acquittal and that same has not been set aside. At the first trial the court acquitted appellant of complicity and the jury returned a verdict also acquitting him of murder.

The requirement of KRS 505.040(a) is met since Commonwealth, at the first trial, tried appellant for complicity and used the evidence regarding the assault to demonstrate the plan/ scheme to murder, of which it was alleged that Peterson was guilty of complicity. Therefore, the manner in which it was used renders it is a lesser included offense. KRS 505.040(a) requires the offense to have been one for which the accused could have been convicted at the first prosecution. The requirement is satisfied insofar as the Commonwealth tried appellant, at

the first trial, for complicity and used, extensively, the evidence concerning the assault to demonstrate and show the scheme to murder Bradley Pruitt and of which the indictment and charge alleged that appellant was guilty of complicity.

The events which occurred on February 16, 1983, were used at the first trial to prove that appellant was engaged in the scheme designed to result in murder and it is sufficient that the assault conduct constituted the same or less than all of the facts required to establish commission of the offense. Thus, under KRS 505.020, we conclude that the second charge was a lesser included offense.

A determination that the second trial was barred by the former prosecution is met through the provisions of KRS 505.040(b). The offense involves, under the facts of this case, the same conduct as the first. As previously discussed,

the February 16 act was used as proof of both the assault charge and the complicity to murder charge. The statute, however, provides that one may be retried if each prosecution requires proof of fact not required in the other prosecution or if the offense was not consummated when the former prosecution began. This latter requirement is met. Chronologically the assault, second degree, offense had been committed when the first (former) prosecution began. We also determine that the provisions of KRS 504.040(b) which requires that each prosecution does not require proof of additional fact that the other prosecution did not require is also met.

Appellant argues that the second trial was precluded by virtue of the double jeopardy clause of the United States Constitution and cites Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 221, 53 L.Ed.2d 187 (1977) in support thereof. In

that case, the appellant had stolen an automobile on November 29, 1973, and was apprehended nine days later driving the car. He was charged with "joy riding" and was convicted and fined. Subsequently he was indicted for theft of the vehicle and the prosecution was barred by the prior conviction. The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment is stated in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932). The rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. The test emphasizes the elements of the two crimes that if each requires proof of fact that

the other does not, the Blockburger test is satisfied, notwithstanding the substantial overlap in the proof. We determine that the Blockburger test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even though two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first. In Re: Nielsen, 131 U.S. 176, 9 S.Ct. 672, 33 L.Ed. 118 (1889); Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). The state has tried appellant for murder and complicity to murder based upon the entire sequence of events transpiring over a several-day period and is precluded from relitigating each of those factual events in a singular manner.

It is maintained that the court erred by instructing the jury on the assault, second degree, charge insofar as the assault, second degree, count of the indictment had been dismissed. Count 2 of the indictment charged that appellant had on February 16, 1983, committed the offense of assault in the second degree, and it was upon Commonwealth's motion and the agreement of appellant, that the court entered an order dismissing this specific count of the indictment. Such an agreement presupposes that the appellant is not to be subjected to prosecution for the same charge but thrust at him in a different manner. Appellant was simply shorn of a defense. We state that the rationale of due process fundamental fairness is applicable in this case.

The Commonwealth relies upon Luttrell v. Commonwealth, Ky., 554 S.W.2d 75 (1977), which we determine has no application herein.

Luttrell, supra does not hold that a previously dismissed count of indictment can be submitted to the jury in an alternative method such as a lesser included offense. We determine that the principles enunciated in the following cases are applicable herein: Workman v. Commonwealth, Ky., 580 S.W.2d 206 (1979); Johnson v. Commonwealth, Ky., 609 S.W.2d 360 (1980). Appellant states that the case of Commonwealth v. Varney, Ky., 690 S.W.2d 758 (1985) supports this argument since in this case an order dismissing the charge had been entered. We find that appellant's conviction for assault, second degree, and being a charge (count) of the indictment which had been dismissed, clearly violates appellant's double jeopardy/due process rights.

Appellant states that the trial court's judgment of conviction fails to comply with RCr 11.04 and is void.

A review of the trial court's order reflects that the resume contained therein suffices to disclose that the judgment is defective, but not in the sense of being void. The order/judgment of conviction fails to set forth appellant's plea. The verdict/adjudication and sentence is technically incomplete, but is not so manifestly wrong as to be void.[1] See Hall v. Commonwealth, Ky., 503 S.W.2d 503 (1972). We note that the appellant has executed bail pending this appeal and no cause has been advanced herein which discloses prejudice to appellant's rights. Were this case to be affirmed, factors precluding resentencing are not apparent in this record as noted in the case of Henry v. Commonwealth, Ky., 586 S.W.2d 304 (1979).

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[1]A compilation of various orders from this record (collectively) would meet the technical requirements of RCr 11.04.

Supreme Court, U.S.
FILED
MAR 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1203

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

COMMONWEALTH OF KENTUCKY, - - Petitioner,

versus

GEORGE W. PETERSON, - - -- Respondent,

On Petition For A Writ of Certiorari To The
Court Of Appeals Of Kentucky

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.

Should this Court grant certiorari to review an unpublished opinion of the Court of Appeals of Kentucky which reversed the assault, second degree conviction of Respondent on grounds of double jeopardy, collateral estoppel and due process violations?

II.

Should this Court grant certiorari to review an unpublished opinion of the Court of Appeals of Kentucky which reversed the assault, second degree conviction of Respondent because of an erroneous jury instruction on the aforesaid charge which had been previously dismissed by written order of the trial court with the consent and agreement of Petitioner?

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No. 89-1203

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

COMMONWEALTH OF KENTUCKY, - - - *Petitioner,*

v.

GEORGE W. PETERSON, - - - - *Respondent,*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE
STATEMENT OF THE CASE

Respondent, George W. Peterson, was indicted, tried and acquitted of both the murder of Bradley Pruitt *and* of complicity to murder Bradley Pruitt. Thereafter, Respondent was indicted for the attempted murder and assault of Bradley Pruitt which occurred four days prior to his death. (TR 83 CR 1623 at 104-105) and (85 CR 0888).

Following a jury trial on the second indictment Respondent was acquitted of the attempted murder charge, but he was convicted of assault, second degree, which charge had been previously dismissed *by written order of the trial court with the consent and agreement of Petitioner.* (TR 85 CR 0888 at 76-109).

The previously dismissed charge of assault, second degree was presented to the jury as a lesser-included offense instruction over the objections of counsel for Respondent. (TR 85 CR 0888 at 86-109).

The Court of Appeals of Kentucky reversed the conviction of Respondent for assault, second degree, in an unpublished opinion rendered on September 15, 1989, on grounds of double jeopardy, collateral estoppel, due process violations and erroneous jury instructions.

The Supreme Court of Kentucky denied discretionary review of the unpublished opinion of the Court of Appeals of Kentucky by order entered on November 22, 1989.

The Kentucky Rules of Civil Procedure, which are also applicable to criminal appeals, provide at Rule 76.28(5) that unpublished opinions of the Kentucky appellate courts are not to be cited or used as authority in any other case in any court of the Commonwealth.

PART TWO

SUMMARY OF ARGUMENT

Respondent respectfully asserts and contends that it is a violation of his double jeopardy and due process rights guaranteed under the United States and Kentucky Constitutions to subject him to criminal prosecution for alleged criminal conduct which had resulted in a previous indictment, jury trial and verdict of acquittal.

Respondent further asserts and contends that it is a violation of his double jeopardy and due process rights guaranteed under the United States and Kentucky Constitutions to convict him of a criminal charge which had been previously dismissed by written order of the trial court with the consent and agreement of Petitioner.

PART THREE

ARGUMENT FOR DENYING THE WRIT OF CERTIORARI

I. The Court of Appeals of Kentucky Correctly Held That Respondent's Acquittal of the Murder and Complicity to Murder Charges Immunized Him from Prosecution on the Attempted Murder and Assault, Second Degree Charges.

Respondent respectfully submits that the Court of Appeals of Kentucky properly reversed his conviction for assault, second degree in its unpublished opinion rendered on September 15, 1989, and under Kentucky law this opinion cannot be cited as precedent in any other case and is applicable to only the very unusual factual circumstances of this case. CR 76.28(5).

Following a jury trial Respondent was acquitted of the separate charges of murder *and complicity to murder* Bradley Pruitt, and at that trial Petitioner introduced extensive evidence attempting to prove that Respondent and Deborah Pruitt were engaged in an ongoing plan and conspiracy to murder Bradley Pruitt during the period from February 5, 1983 through February 20, 1983, and including the assault incident which occurred on February 16, 1983.

KRS 502.020(1) defines the crime of complicity as follows:

> A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:
>
> (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense.

The Court of Appeals of Kentucky correctly held that since Petitioner introduced extensive evidence at Respondent's murder and complicity trial concerning the February 16, 1983 assault in an attempt to prove the conspiracy needed to obtain a complicity conviction, Respondent's acquittal of that complicity charge immunized him from prosecution on the attempted murder and assault, second degree charges arising out of the February 16, 1983 incident.

Petitioner's reliance on *Dowling* v. *United States,* No. 88-6025 (decided January 10, 1990) is misplaced, because at the murder and complicity trial Respondent was charged with, and tried under Kentucky law for, the *separate crime of complicity to murder Bradley Pruitt,* and a conviction of this crime required proof beyond a reasonable doubt. It was not an *uncharged crime* which requires a lesser standard of proof to be admissible under Kentucky law.

The Court of Appeals of Kentucky relying on KRS 505.040; *Sherley* v. *Commonwealth,* Ky., 558 S.W. 2d 615 (1977); *Marshall* v. *Commonwealth,* Ky., 625 S. W. 2d 581 (1982); *Benton* v. *Maryland,* 395 U.S. 784 (1969); *Brown* v. *Ohio,* 432 U.S. 161 (1977); *In Re: Nielsen,* 131 U.S. 176 (1889); and *Ashe* v. *Swenson,* 397 U.S. 436 (1970), correctly held that since the Commonwealth had ". . . tried appellant (Respondent) for murder and complicity to murder based upon the entire sequence of events transpiring over a several-day period . . . it is . . . precluded from relitigating each of those factual events in a singular manner".

Respondent's acquittal of the separate charges of murder and complicity to murder at the first trial immunized him from prosecution on the later indictment for attempted murder and assault, second degree arising out of the February 16, 1983 incident. Respondent had been subjected to

jeopardy on the complicity charge at the first trial, and he could not thereafter be lawfully prosecuted for that same alleged criminal conduct.

II. The Court of Appeals of Kentucky Correctly Held That Respondent Could Not Be Lawfully Convicted of a Criminal Charge Which Had Been Previously Dismissed by Written Order of the Trial Court With Agreement of the Parties.

Respondent further respectfully submits that the Court of Appeals of Kentucky correctly held that it was a violation of his due process/fundamental fairness rights to convict him of a charge that had been previously dismissed by the trial court upon agreement of the parties.

Count 2 of the second indictment charged Respondent with the assault, second degree of Bradley Pruitt which allegedly took place on February 16, 1983, and upon motion of Petitioner and agreement of Respondent the trial court dismissed this count *by written order.*

The Court of Appeals of Kentucky in its opinion rendered on September 15, 1989 held that ". . . [s]uch an agreement presupposes that the appellant (Respondent) is not to be subjected to prosecution for the same charge but thrust at him in a different manner".

The Supreme Court of Kentucky, which denied discretionary review of this case, has consistently required the Commonwealth to adhere to its agreements. In *Workman* v. *Commonwealth,* Ky., 580 S.W. 2d 206 (1979) and *Johnson* v. *Commonwealth,* Ky., 609 S.W. 2d 360 (1980), both cited by the Court of Appeals in its opinion, the Supreme Court of Kentucky reversed criminal convictions for failure of the Commonwealth to adhere to its agreements. The Court in *Workman, supra,* stated that ". . . in the last

analysis we find it less evil that a criminal should escape punishment than that the government should be allowed to welsh on its bargain". *Id.* at 207.

The validity and enforceability of such agreements have also been recognized by this Court in *Santobello* v. *New York,* 404 U.S. 257 (1971) and *Ricketts* v. *Adamson,* 483 U.S. 1 (1987).

The Court of Appeals of Kentucky, in upholding the agreement entered into by the parties and confirmed by the trial court, found and held in its opinion that Respondent's conviction for assault, second degree, ". . . being a charge (count) of the indictment which had been dismissed, clearly violates appellant's (Respondent) double jeopardy/due process rights".

This judgment is not only legally correct, it is fair and just. It should not be distributed by this Court.

PART FOUR

CONCLUSION

This Court should deny Petitioner's request for the issuance of a Writ of Certiorari to the Court of Appeals of Kentucky because it is manifestly clear that the federal questions presented to this Court for review were correctly decided under the precedents of this Court and of the Supreme Court of Kentucky which do not conflict with any applicable decisions of this Court.

Respectfully submitted,

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